IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 33 of 2000

with

ITR Nos. 7/2000 to 13/2000, ITR No.24/2000, ITR Nos. 34 to 36 of 2000, ITR Nos. 48 to 51/2000, ITR Nos. 56 to 109 of 2000, ITR Nos. 12 of 2001 to ITR No. 21 of 2001.

And

TAX APPEAL No. 179 of 1999, 394/1999, 396/1999, 400 and 401 of 1999, 12/1999, 29 of 1999 to 85 of 1999, 101/1999, 103/1999, 105/1999, 361/1999 to 364/1999, 395/1999 to 450 of 1999, 486/1999 to 499 of 1999, 501/1999 to 535/1999, 537/1999, 538/1999, TAX APPEAL NOS. 132 to 135 of 2000, 185/2000, 204/2000, 214 of 2000 to 240 of 2000, 290/2000, 295 to 297 of 2000, 314/2000, 390/2000, 431 to 436 of 2000, 351 of 2000 to 370 of 2000, 372/2000 to 375/2000, TAX APPEAL NO.25 of 2001, 168 of 2001, 170 to 172 of 2001, 254 of 2001 to 256 of 2001.

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

and

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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THE C.I.T.

Versus

UPNISHAD INVESTMENT P. LTD. & OTHERS.

Appearance:

MR Manish R. Bhatt, Mrs. Mauna M. Bhatt,
Mr. Bharat B. Naik and Mr. Tanvish U. Bhatt
Standing Counsel for the Revenue.
MR R.K. Patel, Mr. B.D. Karia, and Mr. Mehul K.
Patel for the assessees.

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 02/08/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In these References, where there are more than one assessee in a reference, the Registry shall give separate Reference numbers for different assessees that is to say that there shall be a separate Reference number for each assessee.

2. In this group of 80 References and 255 Tax Appeals, at the instance of the revenue, the following questions have been referred by the Income Tax Appellate Tribunal, Ahmedabad for the opinion of this Court under Section 256(2) of the Income Tax Act, 1956 (hereinafter referred to as 'the Act) :

1. "Whether in the facts and circumstances of the case, the Appellate Tribunal is right in law that the interest on debentures issued by companies other than local authority, company or corporation established by a Central, State or Provincial Act is not liable to be computed as income under the head 'interest on securities'?

2. Whether interest on debentures in all circumstances is liable to be considered income only when received by the assessee and not when it becomes due ?"

3. The relevant assessment years are 1987-88 and

1988-89. Apart from the References, this group also consists of Tax Appeals filed by the revenue under Section 260-A of the Act. The References as well as the Tax Appeals arise from the Tribunal's judgment and order dated 30th September 1997 and the subsequent orders passed by the Tribunal following the aforesaid judgment. In the Tax Appeals also, the same questions were framed by this Court at the time of admission of these appeals.

4. All the assessees numbering more than 300 were holders of bonds issued by Ambalal Sarabhai Enterprises Ltd., and Repropack Pvt.Ltd. Since common questions of law and facts arise in this group of References and Appeals, with the consent of the learned counsel for the parties, the References as well as the Appeals have been heard together and are being disposed of by this common judgment.

5. The brief facts, leading to these References and Appeals are as under :

5.1. That the assessees had purchased convertible debentures of Ambalal Sarabhai Enterprises Ltd (hereinafter referred to as the 'ASE') for cash in June 1982. The debentures were to carry interest at the rate of 13.5%. Some of the assesses were also allotted 11% bonds of the ASE in July 1979. These bonds had been allotted against debts which were due to the assessees from the ASE. Subsequently on 1-7-1986, these 11% bonds were converted into 15% interest bonds with certain stipulations regarding the payment of interest for a few years. The details of terms and conditions of the bonds and subsequent developments will be referred to a little later.

5.2. To explain the facts of the assessees covered by these References/Appeals pertaining to the bond holders of ASE, we have taken the facts in the case of Upanishad Investment Pvt.Ltd., as an illustrative case for focussing on the controversy involved in these group of matters. While Upanishad Investment Pvt.Ltd., will hereinafter be referred to as 'the Upanishad' or the respondent, all the bondholders who are respondents will hereinafter be referred to as 'the assessees'. The respondent-Upanishad was incorporated under the Companies Act, 1956, on 27th December 1978. It purchased 1822 bonds which were 15% interest bonds. The interest was due from 1st July 1982 for which the relevant assessment year was 1983-84. The details about the interest received by Upanishad from the ASE on the aforesaid bonds are set out as under:

Interest Due from Assessment Year.	Interest Received
1983-84 (31-3-83)	Rs. 61589.00
1984-85 (31-3-84)	Rs. 61589.00
1985-86 (31-3-85)	Rs. 61589.00

The respondent-Upanishad was not carrying on any business in purchase and selling of bonds but it had purchased these bonds by way of investments and was maintaining accounts on cash system of accounting for the income received on such investments. No interest was received by the respondents on the aforesaid bonds from the assessment years 1986-87 onwards. However, the Assessing Officer held in the assessment orders that the income by way of interest from securities had accrued to the respondent for the years under consideration, that is 1987-88 and 1988-89. The income by way of interest on those bonds/debentures was offered for taxation by the respondent on that basis and the same was also assessed by the Assessing Officer on that basis. There is no dispute about this fact as the assessment orders for the earlier years were also produced before the authorities in the present proceedings to show that the income from the bonds in the earlier years was declared and also assessed on the cash method of accounting.

5.3. The bonds were to carry interest on 1st July of every calender year but in June 1985 the ASE offered to the original bondholders a new scheme by virtue of which interest payment upon bonds was deferred for two years and in lieu of deferment of interest, the bondholders were allowed higher rate of interest at 15%. The respondent had accepted this offer and therefore no interest was to be paid for the period upto 30th June 1987 and, therefore, the interest upon bonds held by the respondent was to accrue only on 1-7-1987 and even thereafter. The respondent had thus given up their right of receiving the interest annually in lieu of higher interest rate. Apart from the cash system of accounting for the interest on bonds adopted earlier, the respondent switched over to the cash system of accounting in respect of the entire income also and this change was accepted by the Assessing Officer as a bonafide one and therefore for assessment years 1986-87 and 1987-88 (vide order dated

3-3-89) and similarly for the subsequent years also the orders were passed by the Assessing Officer permitting the assessees to maintain the accounts relating to their income on cash basis.

5.4. In the return of income filed by the respondent as far as the income by way of interest on the bonds was concerned, since no interest was received for the previous years relating to the assessment year 1986-87 and onwards, no such interest income was shown as received. However, the Assessing Officer took the view that the interest income had accrued on the bonds in question and therefore the income so accrued by way of interest on bonds was required to be assessed. In appeals, confirming the view of the Assessing Officer, the CIT (Appeals) held that in view of the provisions of Section 18, income by way of interest on securities was chargeable on accrual basis and not on cash basis and, therefore, such accrued interest in respect of the bonds/debentures was assessable in the hands of the respondent for the years under consideration.

5.5. There is also no dispute about the fact that except the no. of bonds, the facts in the case of all the bondholders of ASE involved in this group of matters hereinafter referred to as the assessees are identical.

6. In second appeal, the Tribunal accepted the contention of the assessees on the following two grounds:

(i) The interest income in question was in respect of the debentures issued by a company which was not established by a Central, State or a Provincial Act.

(ii) Secondly, the Tribunal held that even if Section 18(1)(ii) was applicable to non-government or non-public companies, interest on the debentures of such companies is not necessarily to be taxed on accrual basis and that the assessees who were maintaining cash system of accounting and who had offered such interest income for taxation on cash basis and were also so assessed for earlier years, would not be subjected to tax on accrual basis for the subsequent years, that is assessment years 1987-88 and 1988-89 which are the years under consideration. For this purpose, the Tribunal also relied on the decision of the Hon'ble Supreme Court in Godhra Electricity Co.Ltd. vs. CIT, 225 ITR 746 holding that income-tax is a levy on income and that if income

does not result at all, there cannot be a tax, even though in book keeping, an entry is made about a hypothetical income, which does not materialise. The Tribunal gave the finding that assessees were not able to realise any interest out of these bonds and that when ultimately if the assessees did not get any income, though technically they were entitled to, no tax would be levied.

The Tribunal also followed the principle that when two views are possible, the one in favour of the assessee should be adopted (vide the decision of the Hon'ble Supreme Court in the case of CIT vs. Vegetable Products Ltd., 88 ITR 192).

7. Aggrieved by the aforesaid decision of the Tribunal in all these cases, the revenue preferred applications under Section 256(1) of the Act which came to be rejected by the Tribunal whereupon the revenue filed applications under Section 256(2) of the Act which came to be allowed by this Court and that is how the present group of References came to be made by the Tribunal. Since some of the subsequent orders passed by the Tribunal following the lead judgment dated 30th September 1997 were passed after 1-10-1998, the subsequent orders passed of the Tribunal following the aforesaid lead-judgment came to be challenged by the revenue in Tax Appeals under Section 260-A of the Act.

8. As far as the bondholders of Repropack Pvt.Ltd, are concerned, the details about the interest received by the bondholders on 10.5 per cent bonds and the tax paid by them on such interest are as under :

8.1. Repropack Pvt.Ltd had paid interest on 10.5% on each bond of Rs.100 as under :-

Period	Paid on	Int.Paid Rs.
01-07-1981 to 30-06-1983	30-03-1989	21.00
01-07-1983 to 30-06-1985	16-05-1998	21.00
01-07-1985 to 30-06-1986 (Part)	22-07-1998	3.25

01-07-1985 to 30-06-1986 (Balance)	13-08-1998	7.25	
01-07-1986 to 31-12-1986	09-01-1999	5.25	
01-01-1987 to 30-06-1987	05-04-1999	5.25	
Total Interest per bond for 6 years			63.00

8.2. The bond holders offered the said income on receipt basis as under and paid tax at applicable rate :

Assessment Year	Interest per bond Rs.	Period
1989-90	21.00	1-7-81 to 30.6.83
1999-00	36.75	1.7.83 to 31.12.86
2000-01	5.25	1.1.87 to 30.6.87
Total Interest offered for Taxation.	63.00	

9. The assessees who are bondholders of Repropack Ltd contended that they have paid tax on interest on 10.5% bonds on receipt basis. Assessment of the said income in the respective assessment years on accrual basis u/s. 18(1) of the Act will amount to double taxation of said income which is not permissible as per principles of double taxation accepted by Indian Tax Laws. The Assessing Officer, however, took the view that interest on the bonds was required to be charged on accrual basis and not on receipt basis and therefore similar controversy arose between the bondholders of Repropack Pvt.Ltd and the revenue following same pattern ultimately culminating into the orders of the Tribunal following the aforesaid judgment in the case of Upanishad Investment Pvt.Ltd.

10. At the hearing of this Reference, as far as Question No.1 is concerned, Mr. M.R. Bhatt, learned Senior Standing Counsel for the revenue has submitted

that the provisions of Section 18(1)(ii) are very clear and they are applicable to interest on securities of all companies irrespective of the fact whether they are Government, Semi-Government companies or other companies. Reference is made to the legislative history to point out that a company was included in Section 8 of the Indian Income Tax Act, 1922 corresponding to Section 18 of the 1961 Act and that there was no justification for the Tribunal to take the view that only companies established under a Central Act, State Act or Provincial Act are covered by the provisions of Section 18(1)(ii) of the Act.

11. In reply, Mr. R.K. Patel, learned counsel for the assessee has submitted that the scheme of Section 18 clearly indicates that it is applicable to securities issued by the Central Government, the State Governments, local authorities and companies and public corporations established by a Central Act, a State Act or a Provisional Act and therefore only Government companies are covered by the provisions of Section 18(1)(ii) of the Act. The learned counsel submitted that the Tribunal has rightly applied the rule of interpretation, nositur asocii, a word is known by the company that it keeps and, therefore, the instruments, that is bonds/debentures offered by ASE Ltd and Repropack Pvt.Ltd., do not fall within the provisions of Section 18(1)(ii) of the Act. In support of the said submission, the learned counsel has also relied on the decision of the Madras High Court in CIT Vs. Lakshmi Vilas Bank Ltd., 228 ITR Page 697.

The ld. counsel for the assessee has also submitted that as a matter of practice all these years interest on debentures of non-government companies is shown and/or being treated as income from other sources.

12. Having heard the ld. counsel for the parties, it appears to us that the legislative history throws a flood of light on the controversy at hand. Section 8 of the 1922 Act read as under :

"8. The tax shall be payable by an assessee under the head "Interest on securities" in respect of the interest receivable by him on any security of the Central Government or of a State Government, or on debentures or other securities for money issued by or on behalf of a local authority or a company :

....."

Section 18(1) of the 1961 Act which was in force for the relevant Assessment Year under consideration read as under :

"18. (1) The following amounts due to an assessee in the previous year shall be chargeable to income-tax under the head "Interest on securites",____

(i) interest on any security of the Central or State Government;

(ii) interest on debentures or other securities for money issued by or on behalf of a local authority or a company or a corporation established by a Central, State or Provincial Act."
(emphasis supplied).

It is thus clear that Section 8 of the 1922 Act covered the securities of a local authority and a company without any further reservation as far as the nature of the company or its incorporation was concerned. However, the 1961 Act added "public corporations established by a Central Act, State Act or Provincial Act. The Legislature, therefore, simply enlarged the class of the persons issuing the securities and did not, nor did it intend to, restrict class of persons issuing the securities earlier provided in the 1922 Act. Hence the words "established by a Central, State or Provincial Act" only qualify the word "a Corporation" and not "a local authority or a company" which were already there in Section 8 of the 1922 Act.

13. As regards reliance placed by the ld. counsel for the petitioner on the decision of the Madras High Court in CIT Vs. Lakshmi Vilas Bank Ltd (Supra), that was a case pertaining to a cooperative society registered under the Cooperative Societies Act. Obviously a Cooperative Society registered under the Cooperative Societies Act is not (i) a local authority or (ii) a company or (iii) a public corporation established under a Central, State or Provincial Act. The Court, therefore, accepted the contention of the revenue that the body registered under the Cooperative Societies Act cannot be said to be covered by the provisions of Section 18(1)(ii) of the Act. In fact, the Court did not approve of the view of the Tribunal in that case that interest from debentures issued by the companies shall be entitled to be excluded from the provisions of Section 18(1)(ii) of

the Act.

14. We accordingly hold that the interest on debentures issued by all companies, whether or not established by a Central, State or Provincial Act, is liable to be computed as income under the head "Interest on Securities" as per the provisions of section 18(1)(ii) of the Income Tax Act, 1961 for the relevant Assessment Years under consideration. We accordingly answer Question No.1 in the negative, that is in favour of the Revenue and against the assessee.

15. Coming to the second question, the same has been more seriously contested by both the parties. Mr. M.R. Bhatt, ld, counsel for the revenue has submitted as under :

15.1. When the Legislature has expressly used the word "due" in Section 18(1) of the Act, it means that the liability of the assessee to pay tax on 'interest on securities' arises as soon as such interest is due and that the liability to pay tax is not to be deferred till the stage when the assessee receives the interest, in fact whether the assessee receives the interest or not is a matter of no concern to the tax authorities in view of the provisions of Section 18(1) of the Act. Reference is made to the legislative history. In Section 8 of the 1922 Act, the Legislature had used the word "receivable" and the same was interpreted as "actually received" by the Bombay High Court in Seth Lalbhai Dalpatbhai v. Commissioner of Income-Tax, Bombay North 22 ITR Page 13. Hence, to make its intent clear the Legislature thereafter used the word "due" in the corresponding Section 18(1) of the 1961 Act. The learned counsel has further referred to the dictionary meanings of the word "due" to show that a debt or other obligation is due when it is legally enforceable. Reliance is also placed on the decision in (1942) 10 ITR 199 wherein the word 'due' in Section 7(1) of the Act was interpreted as not limited to salary due in respect of the accounting year but includes also unpaid salary due in respect of previous years. Reliance is also placed on the decision of the Bombay High Court in AIR 1978 Bom. 369(375) holding that the word 'due' means all monies, debt or payable even though their recovery may be barred by law of limitation. It is vehemently submitted that the word 'due' is in contradistinction to the word "received" which refers to "actually received".

15.2 When the Legislature has made an express provision that when the "Interest on Securities" issued

by the specified bodies is due, the same is to be charged as income, in view of this mandatory provision, there is no scope for inquiry whether the assessee is maintaining accounts on cash basis or on accrual basis. Reference is also made to various commentaries in support of the contention that there is a second departure made by the Legislature while enacting Section 18(1) of the 1961 Act, vis-a-vis the provisions of Section 8 of the 1922 Act. Under the 1922 Act, 'Interest on Securities' was taxable on the basis of the receipt as held by the Bombay High Court in Seth Lalbhai Dalpathbhai's case (Supra) and therefore the Legislature has now used the word "due" to make it clear that 'Interest on Securities' is taxable on accrual basis and that therefore the question whether 'Interest on Securities' is actually received or not is not germane for the purposes of taxing such income under Section 18(1) of the Act.

15.3 The controversy is now concluded in favour of the revenue by the decision of this Court in the case of Sarabhai Chemicals (P.) Ltd, v/s. C.I.T. (2002) 121 Taxman Page 755 (Guj) wherein this Court examined a similar controversy about accrual of interest and the creditors waiving interest subsequently with the retrospective effect, and this Court has held that interest which had already accrued, cannot be taken out of income merely because the creditors or the bondholders waive the interest.

16. On the other hand, Mr. R.K. Patel and Mr. B.D. Karia, ld. counsel for the assessees have submitted as follows :

16.1. The change in phraseology in the 1961 Act does not make any difference, because even the 1922 Act had used the word "receivable" which was interpreted by Chief Justice M.C. Chagla, speaking for the Division Bench of the Bombay High Court, to mean that it is on actual receipt that interest on securities becomes taxable. "Receivable" and "Due" convey the same meaning and are interchangeable. It is further submitted that the word "due" means 'payable by the borrower', and the corresponding expression "would be receivable by the creditor". The word "receivable" was also interpreted by the Bombay High Court to mean that interest on securities becomes income when it is actually received and not when it is capable of being received by the assessee.

16.2. Strong reliance is also placed on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Vijaya Bank Ltd., 187 ITR 541 and the Karnataka High Court in

CIT Vs. Canara Bank 195 ITR Page 66, in so far as they lay down that income by way of interest on securities attracts Section 18 when the securities yield income by way of interest and not before that date. It is submitted that in the facts of the present case as far as the debentures of ASE Ltd are concerned, the same did not yield any income by way of interest or otherwise after assessment year 1986-87 and therefore there was no question of Section 18 being attracted.

16.3. Without prejudice to the aforesaid submissions, it is submitted that whatever meaning may be attributed to the expression "due", as per the concept of real income adopted by the Hon'ble Supreme Court since the days of M/s. Soorji Vallabhdas & Company (1962) 46 ITR 144 and recently confirmed in Godhra Electricity Company, (1997) 225 ITR 746, income-tax is a levy on income and that if income does not result at all, there cannot be a tax even though the assessee is following the mercantile system of accounting, even though any book keeping entry is made about hypothetical income, if such income does not materialise, there does not result any income at all and therefore there cannot be a tax.

17. In Seth Lalbhai (Supra), the Bombay High Court relied on the observations made by the Privy Council in St. Lucia Usines and Estates Co.Ltd. v. Colonial Treasurer of St. Lucia, [1924] Appeal Cases 508 (512), that the words "income arising or accruing" are not equivalent to the words "debts arising or accruing" and there must be a coming in to satisfy the word "income". Therefore, if there is a debt due or if there is a debt arising or accruing, it is not income which arises or accrues and therefore if the contention of the Department is that interest was due by the Government to the assessee, the mere fact that debt was due did not make the debt the income of the assessee. Till the debt came in ,it did not become income and therefore in case of a debt it only becomes income when it is paid and received by the assessee. In the facts of that case, the assessee was maintaining the mercantile system of accounting and even then the Bombay High Court took the aforesaid view and held that there can be no mercantile method basis as far as Section 8 (1922 Act) is concerned under which interest on securities only becomes "income" when it is actually received and not when it is due or capable of being received by the assessee.

18. The aforesaid decision of Chief Justice Chagla, speaking for the Division Bench, was rendered on March 27, 1952 and is, therefore, certainly binding on this

Court. The only question is whether there is any material difference on account of the change of the expression "receivable" to "due". Before answering this question, it is necessary to refer to provisions of Sections 193 and 145 of the 1961 Act. Section 193 of the 1961 Act, (which came into effect from 1-4-1989) reads as under, in so far as the same is relevant.

Interest on securities.

"193. The person responsible for paying any income by way of interest on securities shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax at the rates in force on the amount of the interest payable :

Provided......."

Section 145(1) dealing with the method of account, originally provided that the income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" shall, subject to the provisions of sub-section (2) , be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. In view of the deletion of the provisions of Sections 18 to 21 of the Act, w.e.f. 1-4-1989, the second Proviso to Section 145 was inserted with effect from 1-4-1989 to read as under :

"Provided further that where no method of accounting is regularly employed by the assessee, any income by way of interest on securities shall be chargeable to tax as the income of the previous year in which such interest is due to the assessee."

Although the amendment was with effect from 1-4-1989, it clearly provides that any income by way of interest on securities shall be chargeable to tax as the income of the previous year in which such interest is due to the assessee only where no method of accounting is regularly employed by the assessee. In other words, if the assessee is maintaining cash system of accounting, the aforesaid proviso would not apply. This amendment appears to be more clarificatory in nature than making any departure from the previous law on the subject. Even

the provisions of Section 193 inserted with effect from 1-4-1989 require the company, making the payment of interest on securities, to deduct tax at source at the time of payment of interest, and not when the amount is due. If income by way of interest on securities were to be treated as payable by the company to the debenture holders on the due date for payment,the company would have been liable to deduct the tax at source on such due date and not at the time of payment. It appears from the aforesaid provision that the legislative intent is that when the assessee is maintaining cash system of accounting, income by way of interest on securities will have to be charged to tax only when the assessee actually receives the interest and not on the date on which interest on such debentures might become due.

19. We are of the view that though the Legislature changed the expression from "receivable" to "due" in Section 18 of the 1961 Act (corresponding to Section 8 of the 1922 Act), we are unable to find any substantial difference between the expression "receivable" on the one hand and "due" on the other hand. 'Receivable' and 'Payable' are the same things (See Hayward vs. James (29) Chancery Division 822). The expression 'receivable' is used with reference to the receipient and the word 'payable' is used with reference to the payer. 'Due' means as a noun; an existing obligation or a simple indebtedness without reference to the time of payment; or a debt ascertained and fixed though payable in future. As an adjective, 'due' means capable of being justly demanded, payable or owing and unpaid. The expression 'due' is defined by 'Webster' to mean that which is owed; that which custom, statute or law requires to be paid.

20. At this stage, we may also refer to the decision of the Hon'ble Supreme Court in Vijaya Bank Ltd and of the Karnataka High Court in Canara Bank (Supra), where the Courts held that income attracts Section 18 when the securities yield income by way of interest.

21. It is true that Mr. Bhatt, learned counsel for the revenue has vehemently submitted that those decisions were rendered in the context of the dispute as to whether the securities yielded any income during the broken period of any year when the securities are purchased by the assessee before the due date. While the submission of Mr. Bhatt is not entirely off the mark, the fact remains that in that case the securities did yield interest and the question was only whether interest could be said to have accrued on day to day basis or only on the date on which the securities yielded interest. The

Apex Court as well as the Karnataka High Court have clearly held that income by way of interest on securities attract Section 18, only when the securities yield income by way of interest and not before that date. The expression "securities yielded income by way of interest" would not mean "income by way of interest accrues on securities". Hence, there appears to be substance in the submission of the learned counsel for the assessee that Section 18(1) did not contemplate charging tax on income by way of interest without any interest actually having been paid.

22. In this connection, it is necessary to refer the decisions of the Hon'ble Supreme Court on the concept of 'real income'. In Godhra Electricity Co. Ltd. vs. CIT (1997) 225 ITR 746 (Supra), the Apex Court has reiterated the principle laid down by it, as far back as in 1962 in CIT vs. Shoorji Vallabhdas and Co., 46 ITR, (145) as under :

> "Income-tax is a levy in income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a hypothetical income, which does not materialise."

In Godhra Electricity Co.Ltd., the Apex Court, thereafter, added that this principle is applicable whether the accounts are maintained on cash system or under the mercantile system. If the accounts are maintained under the mercantile system what has to be seen is whether income can be said to have really accrued to the assessee-company.

23. In the facts of the present case, since the accounts are, admittedly, maintained on cash system for the years under consideration and for which the Assessing Officer had granted permission, there is no scope for any further inquiry whether income can be said to have really accrued to the assessee or not. There is no dispute about the fact that the assessees who were bondholders of ASE Ltd., did not receive any interest for the assessment year 1986-87 onwards.

24. Mr. Bhatt, ld. counsel for the revenue, though

not disputing the aforesaid two material facts that the assessees did not receive any interest from the ASE Ltd from assessment year 1986-87 onwards, and that the assessees were maintaining cash system of accounting, submitted that on 30th March 1990, the bondholders of ASE Ltd., had passed a resolution under which the assessees got equity shares of ASE Ltd in lieu of bonds and therefore it cannot be said that the assessees did not receive any consideration in lieu of interest on bonds.

In view of the above submission, it is necessary to refer to the contents of the said Resolution, which forms part of the order of the CIT :

"(a) Both the bonds of Series A and Series B would become zero interest bonds with effect from 1.7.1986 from which date interest had not been paid by ASE, till the date of redemption.

(b) Series A bonds of Rs. 100 each would be redeemed by the issue and allotment of 7 equity shares of Rs. 10 each at par.

(c) Series B bonds of Rs. 100 each on which redemption premium of Rs. 5 was payable as per the terms of issue, would be redeemed by the issue and allotment of 7.5 equity shares of Rs. 10 each at par."

Those bondholders who would not accept the above options were to retain their bonds on the basis of the same terms and conditions at the time of issue. Out of the bondholders holding bond of Rs, 25 crores, those holding bonds of Rs. 23.19 crores including all the assessees in the present group accepted the above scheme. The other holders of bonds of Rs. 1.81 crores who did not accept the above scheme, did not get either interest or any amount on account of the principal from the ASE Ltd. Mr. Bhatt has submitted that the company had in the initial offer which was accepted by the bondholders stipulated that the shares of ASE Ltd would be issued at a premium of Rs. 5 per share, but the Controller of Capital Issues did not permit charging such premium and therefore ASE Ltd issued shares at par to the bondholders like the assessees. At the relevant time that is in December 1990, the market price of shares of ASE Ltd was ruling in the region of Rs. 14 to Rs. 15 per share. (Page 172 of the Paper Book) and therefore when the assessees got such shares at par, the price difference of Rs. 4 to Rs.5 per share was obtained by the assessees in lieu of interest

on the bonds and that therefore it would not be entirely correct to say that the assessees did not receive any amount in lieu of interest.

25. The submission made on behalf of the revenue cannot be accepted for the simple reason that though the shares of the market price of Rs.14 to Rs.15 per share as against the face value of Rs. 10 were issued to the bondholders at par, it has to be noticed that as against Series A bonds of Rs.100 each, the bondholders were allotted only 7 equity shares of Rs. 10/- each and the bondholders of Series B bonds of Rs. 100 were allotted only 7.5 equity shares of Rs. 10/each at par. Hence even applying the price of Rs. 14 to Rs. 15 per share to the shares allotted to the bondholders in lieu of bonds of Rs.100/- each, the bondholders did not get any amount in excess of Rs. 100 per bond and the bondholders also admittedly did not get any interest for the period from 1986 to 1990 or thereafter till the date of redemption of bonds by allotment of equity shares in the aforesaid ratio. It is, therefore, clear that the bondholders neither got any interest nor any amount in lieu of interest.

26. Mr. Bhatt for the revenue however submitted that in a similar case of Sarabhai Chemicals P.Ltd., 121 Taxman Page 755, a Division Bench of this Court has considered the similar controversy where interest had already accrued and subsequently the creditors waived interest. This Court held that waiver of interest with retrospective effect would not render taxable income as non-taxable, and, in the said decision, this Court has also examined the decisions on the concept of real income and even thereafter held that the income which had already accrued cannot be allowed to come out of tax net by such devices.

27. Having perused the aforesaid decision of this Court in Sarabhai Chemicals Pvt.Ltd., (Supra), to which one of us was a party, we find that there are several material distinctions between the facts of that case and the facts in the instant group of matters:

(i) In Sarabhai Chemicals P.Ltd., case, the contractual liability was between the holding company and the subsidiary company, and the subsidiary company passed a resolution for waiving interest on the last date of the accounting year after the interest had accrued.

In the instant case, the assessees were

not the only bondholders of ASE Ltd. The Court is informed and there is no dispute about the fact that there are also other bondholders holding bonds of the face value of Rs. 2 crores who are not in any way related to the persons in the management of ASE Ltd or with the assessees.

(ii) In Sarabhai Chemicals case, this Court came to the conclusion that passing of a resolution for waiver of interest on the last date of accounting year was a device adopted by the holding company and the subsidiary company to avoid payment of tax which could not be accepted so as to retrospectively waive the income accrued to the assessees in that case, who were maintaining the mercantile system of accounting.

In the instant case, the assessees are, admittedly, maintaining cash system of accounting.

(iii) In the instant case, the assessees were holding the bonds in ASE Ltd as well as in Repropack Pvt.Ltd., by way of investments and not by way of stock-in-trade.

In Sarabhai Chemicals case, the subsidiary company was held to be engaged in the business and the assessee subsidiary company had sold its properties and the payment of sale price was deferred with liability to pay interest and after the interest had accrued to the assessee, on the last date of the accounting year, the assessee company had passed a resolution for waiver of interest. The transaction in question was found to be a part of the business of the assessee unlike the facts of the instant case where the assessee was holding the bonds of ASE Ltd and Repropack Pvt.Ltd by way of investments.

(iv) In the instant case, all the assessees had consistently paid tax on interest actually received from ASE Ltd as well as Repropack Pvt.Ltd since cash method of accounting is consistently followed by the assessees with the permission of the Assessing Officer. The bondholders of ASE did not get any interest on debentures/bonds for assessment years 1986-87 onwards till the date of their redemption as aforesaid. The bondholders of Repropack Pvt.Ltd did receive interest though much later than the

date on which the company was liable to pay interest to the bond holders but the interest actually received by the assessee-bondholders for the respective assessment years was offered for tax in the year in which the interest was received, the details of which are already given at the outset.

In view of the above distinguishing features, we are clearly of the view that in this group of matters, the decision rendered by this Court in Sarabhai Chemicals (P) Ltd (Supra) is not at all applicable.

28. In view of the above discussion, our answer to question No.2 is that since the assessees were adopting cash system of accounting, interest on debentures of ASE Ltd and Repropack Pvt.Ltd., is liable to be considered as income only when received by the assessees and not when it was due for payment by the respective companies.

29. In view of the above, all the References stand disposed of. In view of the above findings, all the Tax Appeals are accordingly dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

[M.S. Shah, J.]

rmr. [K.A. Puj, J.]